LIM KOK CHEE

v.

CHONG FATT

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[CIVIL SUIT NO. C 4712 OF 1984]
4 APRIL 1986

CIVIL PROCEDURE: *Order 14 judgment - Application to set it aside - On ground that defendant not aware of date of hearing of the O. 14 summons - "Proposed Amended Statement of Defence" - Completely different from first statement of defence - Affidavit - whether application should be allowed.*

The plaintiff took out O. 14 proceedings against the defendant for an amount of money said to have been had and received arising out of the alleged sale of certain machinery by the defendant to the plaintiff (which machinery, it was alleged, was not delivered to the plaintiff) and for a further amount as repayment of an alleged loan. The defendant's then solicitors filed and delivered a defence. On receipt of the O. 14 summons they sought instructions thereon. They could not obtain instructions from the defendant. In the event they took out an application to be discharged from further acting for him.

On 10 May 1985 personal service of the solicitor's application and of the supporting affidavit were effected on the defendant at Malacca.

On 23 May the defendant did not attend at the hearing of the solicitor's application and an order was made discharging the solicitors. On 27 June the defendant did not attend at the O. 14 hearing and an order in terms of the application was given.

In early 1985 the defendant received a letter from the plaintiff's solicitors informing him that judgment had been obtained against him. On 10 September the defendant through another firm of solicitors filed an application to have the O. 14 judgment set aside and for certain consequential orders. In his affidavit the defendant stated, *inter alia*, that in fact he had been working in a jungle area and that because of that, his erstwhile solicitors had not been able to contact him. He also stated that he was not aware of the date of hearing of the O. 14 summons until he had received the plaintiff's solicitors' letter. The defendant went on to exhibit a "proposed amended statement of defence" to his affidavit which he contended provided him with a "complete defence to the plaintiff's claim".

Held:

[1] The defendant's story that he was at all material times in the jungle does not fit in with his having been personally served with the summons on 10 May 1985 at Malacca. The defendant was well aware of the solicitor's summons and of the O. 14 proceedings and of their respective dates of hearing well before those dates but did nothing about them or either of them. He had simply ignored them.

[2] The defendant has not explained why the stand taken in the statement of defence that was filed on his behalf is so very different from the stand now sought to be taken. Nor could he explain why his previous solicitors were given different instructions in respect of the statement of defence from that he has given his present solicitors.

[3] What the defendant has to state as a completely new line of defence is not stated by affidavit or verified by affidavit. Order 14 r. 4(1) provides for the defendant to show cause "by affidavit or otherwise to the satisfaction of the Court". This should normally be by affidavit which must condescend to particulars. It is not sufficient for the defendant to produce as an exhibit to an affidavit a "proposed statement of defence". The facts relied on for the defence must normally be verified by affidavit. And particularly when the defendant is, as in this case, departing from the line of defence set out in the statement of defence as filed, the defendant will not be permitted to depart from this requirement.

[4] In any event there were no merits in the original or proposed defence. In fact each of them was a sham. The defendant ignored his erstwhile solicitors' requests for instructions on the O. 14 application because he was well aware that he did not have any *bona fide* defence of merits.

[Application dismissed with costs.]

Other source referred to:
White Book, 1982, Vol. 1, para. 4/3, 4/4 & 14/3

For the defendant/applicant - Haji Abdul Kariem Bashir; M/s. Bashir & Co.
For the plaintiff/respondent - Ramdas Tikamdas; M/s. Siva, Ram & Associates

JUDGMENT

VC George J:

The defendant caused an appearance to be entered on 6 February 1985 by his then solicitors who filed and delivered a defence on or about 14 March 1985.

The claim is for an amount of money said to have been had and received arising out of the alleged sale of certain machinery by the defendant to the plaintiff (which machinery, it is alleged, was not delivered to the plaintiff) and for a further amount as repayment of an alleged loan. It is contended that there was a written contract to the sale and a written acknowledgment of the loan.

By the statement of defence it is contended

(1) that the contract was not signed by the defendant

(2) alternatively that its contents were not read over and explained to the defendant

(3) that in any event it was void for non-compliance with the Bill of Sales Act 1950, and

(4) that as to the loan that the money had not been received by the defendant.

The plaintiff took out O. 14 proceedings and exhibited to the affidavit in support of the summons a copy of the written contract and of the acknowledgment of the loan. There was also an affidavit (encl. (14)) by two persons both of whom claimed to have witnessed the defendant executing the written contract and one of them claimed that he had seen the defendant receive the RM16,000 as a loan.

On receipt of the O. 14 summons it would appear that the defendant's then solicitors sought instructions thereon. They claimed that they had both written and telephoned their client but that he had failed to attend on them. They could not obtain instructions from the defendant.

In the event they took out an application to be discharged from further acting for him. Encik Anthony Taye the solicitor having the conduct of the defendant's case affirmed an affidavit

in support of the application to which was exhibited a copy of his firm's letter to the defendant dated 18 April 1985 informing the defendant of the O. 14 application a copy of which was enclosed and requiring him to give instructions. Also exhibited was a photocopy of the relevant AR registered card which shows that the letter was received at the defendant's address on 4 April 1985. Taye stated in his affidavit that "despite the said letter and several telephone calls the defendant has failed to call at my office".

On 7 May 1985 the defendant's then solicitors sent another AR registered letter to the defendant at his address (receipt of which letter was also acknowledged on 8 May by somebody at the said address) informing the defendant that the solicitor's application for summary judgment had been fixed for hearing on 27 June.

On 10 May 1985 personal service of the solicitor's application and of the supporting affidavit were effected on the defendant at Malacca.

On 23 May the defendant did not attend at the hearing and an order was made discharging the solicitors. On 27 June the defendant did not attend at the O. 14 hearing and an order in terms of the application was given.

In early September 1985 the defendant received a letter dated 30 August 1985 from the plaintiff's solicitors informing him that judgment had been obtained against him. On 10 September the defendant through another firm of solicitors, M/s. Bashir & Co., filed an application to have the O. 14 judgment set aside and for certain consequential orders. This application (25) which is now before me is supported by the defendant's affidavit (24) by which he states *inter alia* that in fact he had been working in a jungle area and because of that, his erstwhile solicitors had not been able to contact him which was why, as he understood it, they had applied to be discharged from acting for him. He also states that he was not aware of the date of hearing of the O. 14 summons until he had received the plaintiff's solicitors' letter of 30 August. The defendant went on to exhibit a "proposed amended statement of defence" to his affidavit which he contended provided him with a "complete defence to the plaintiff's claim".

Encik Ng Chwee Har, clerk to the defendant's erstwhile solicitors states in his affidavit (16) that not only was that letter of 7 May sent by AR registered post to the defendant but that on 10 May the defendant was (as has been seen) personally served with a copy of his erstwhile solicitor's summons. No explanation has been given as to why the defendant did not contact the solicitors in respect of that summons served on him on the 10th. It is not denied that the address to which those AR registered letters were sent was that of the defendant. I assume that in the normal cause of events those letters would have been brought to the attention of the defendant even if they were not received by him personally. His story that he was at all material times away in the jungle does not fit in with his having been personally served with the summons on 10 May 1985 at Malacca. His contention that at all material times he was in the jungle area off Jelebu is obviously not true. I cannot but conclude that the defendant was well aware of the solicitor's summons and of the O. 14 proceedings and of their respective dates of hearing well before those dates but did nothing about them or either of them. He had simply ignored them and is now caught lying. On this conclusion alone the application should be dismissed. But before doing so I looked for some hope of redemption for the defendant in his statements of defence.

Now I have to assume that the first statement of defence (that had been filed on his behalf) was on the defendant's instructions. He does not state otherwise. But he now comes up

with a completely different defence. Now he admits that he had executed the agreement as well as the receipt in respect of the alleged loan. In effect the contention now appears to be that the documents were executed "for the record" apparently to provide evidence of the defendant's 50% share in the equity of a corporation to be formed such share to be held by one Mohamed Ali bin Mohamed in trust for the defendant, the other 50% to be held by one Lim Kok Wah in trust for the plaintiff. I have failed to see any nexus between such a scheme and the two documents that is now being admitted to have been executed by the defendant. How a contract by the defendant to sell machinery to the plaintiff or an acknowledgement of a loan from the plaintiff to the defendant could be relevant in respect of the formation of a company in which the shareholders were going to be Lim Kok Wah and Mohd. Ali bin Mohamed (albeit as trustees) was not explained and in any event is completely beyond my comprehension.

Further and in any event the defendant has not explained why the stand taken in the Statement of Defence that was filed on his behalf is so very different from the stand now sought to be taken. He has not explained why his previous solicitors were given different instructions in respect of the statement of defence from that he has given his present solicitors.

It is also to be noted that what the defendant has to state as a completely new line of defence is not stated by affidavit or verified by affidavit. Order 14 r. 4(1) provides for the defendant to show cause "by affidavit or otherwise to the satisfaction of the Court". It is settled that this should normally be by affidavit which must condescend to particulars. It is not sufficient for the defendant to produce as an exhibit to an affidavit a "proposed statement of defence". The facts relied on for the defence must normally be verified by affidavit. (See 1982 *White Book* Vol. I para. 14/3 - 4/3 and 4/4). And particularly when the defendant is, as in this case, departing from the line of defence set out in the statement of defence as filed the defendant will not be permitted to depart from this requirement.

In any event I fail to see any merits in the original or proposed defence. In any event I am satisfied that each of them is a sham. I have no doubt in my mind that the reason the defendant ignored his erstwhile solicitor's requests for instructions on the O. 14 application is that he was well aware that he did not have any *bona fide* defence of merits.

The application is dismissed with costs.

Also found at [1986] 2 CLJ 305